

United States District Court Central District of California

ROBERT FORTE,

Plaintiff,

v.

CHRISTINE BARBER, M.D.;

DEPARTMENT OF CORRECTIONS &

REHABILITATION; and BRUCE K.

FACEHAR,

Defendants.

Case No. 2:13-cv-06829-UA(AJWx)

ORDER DENYING MOTION TO DISQUALIFY MAGISTRATE JUDGE [31]

Before the Court is Plaintiff Robert Forte's Motion to Disqualify Magistrate Judge. (ECF No. 31.) Forte is a state prisoner and representing himself in this matter. He argues that Magistrate Judge Andrew Wistrich should be disqualified for "fail[ing] to do his duty." For the reasons discussed below, the Court **DENIES** Forte's Motion.

On May 23, 2013, Forte initiated this suit against Defendants based on alleged Eighth Amendment violations. (ECF No. 1.) Forte alleges that he is more susceptible to contracting "Valley Fever," but that prison officials have ignored his requests for special accommodation to prevent him from contracting the disease.

Forte was denied leave to proceed in forma pauperis, and his Complaint was dismissed with prejudice on October 4, 2013. (ECF No. 18.) The Ninth Circuit reversed the dismissal with prejudice and remanded the action to district court so that

1 Forte could file an amended complaint to try and cure the deficiencies. (ECF No. 27.)
 2 On May 29, 2014, Magistrate Judge Wistrich issued an order setting a June 30, 2014
 3 deadline for Forte to file an amended complaint. (ECF No. 30.) Magistrate Judge
 4 Wistrich also explained what is required of Forte to seek leave to proceed in forma
 5 pauperis. Forte filed this Motion to Disqualify on June 10, 2014. (ECF No. 31.)

6 The standard for disqualification of a federal judge is established by 28 U.S.C.
 7 §§ 144 and 455. In giving Forte the benefit of the doubt as a pro se movant, the Court
 8 construes his request under both statutes. Section 144 permits a party seeking
 9 disqualification to file an affidavit setting forth facts and reasons for his belief that the
 10 judge “has a personal bias or prejudice either against him or in favor of any adverse
 11 party.” 28 U.S.C. § 144. When determining the affidavit’s legal sufficiency, “the
 12 factual allegations in the affidavit must be accepted as true,” although “general or
 13 conclusory allegations will not support disqualification.” *United States v. Zagari*, 419
 14 F. Supp. 494, 500–01 (N.D. Cal. 1976). Further, the alleged bias must be from an
 15 extrajudicial source and “result in an opinion on the merits on some basis other than
 16 what the judge learned from his participation in the case.” *United States v. Grinnell*
 17 *Corp.*, 384 U.S. 563, 583 (1966).

18 Under 28 U.S.C. § 455, a judge must disqualify herself in any proceeding in
 19 which one might reasonably question her impartiality. 28 U.S.C. § 455(a). But the
 20 substantive standard for recusal under §§ 144 and 455 is the same: whether a
 21 reasonable person with knowledge of all the facts would conclude that the judge’s
 22 impartiality might reasonably be questioned. *United States v. Hernandez*, 109 F.3d
 23 1450, 1453–54 (9th Cir. 1997).

24 Forte does not specifically address why he believes that the Court should recuse
 25 Magistrate Judge Wistrich under either §§ 144 or 455. But in any event, the Court
 26 finds that neither section compels Magistrate Judge Wistrich’s disqualification.

27 Section 144 requires the movant to file an affidavit stating “the facts and the
 28 reasons for the belief that bias or prejudice exists.” § 144. Forte has filed no such

1 affidavit, thereby rendering his Motion procedurally defective. That failure is alone
2 enough to deny his recusal Motion.

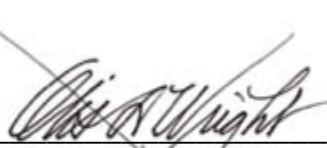
3 But even if Forte had properly filed an affidavit, he has not demonstrated that
4 Magistrate Judge Wistrich exhibited any “personal bias or prejudice either against him
5 or in favor any adverse party.” *See* § 144. Rather, Forte only alleges that “the court
6 will not do its duty to establish law and publish the law.” His allegations lack
7 specificity and appear to be based solely on his disagreement with Magistrate Judge
8 Wistrich’s application of the law prior to the Ninth Circuit reversal on procedural
9 grounds. There is simply no basis for disqualification under § 144.

10 Section 455 governs mandatory self-recusal and largely overlaps with § 144.
11 Forte likewise has not presented any evidence that Magistrate Judge Wistrich failed to
12 recuse himself based on any of the factors enumerated in § 455. There is no
13 indication that Magistrate Judge Wistrich has any bias or prejudice concerning any
14 party to this action, he previously practiced as a lawyer in the matter, or has any
15 financial interest in the outcome of Forte’s case. § 455(a), (b).

16 The Court finds that no reasonable person could reasonably question Magistrate
17 Judge Wistrich’s impartiality. Therefore, the Court **DENIES** Forte’s Motion to
18 Disqualify. (ECF No. 31.)

19 **IT IS SO ORDERED.**

20
21 June 16, 2014

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25 **OTIS D. WRIGHT, II**
26 **UNITED STATES DISTRICT JUDGE**

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